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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EUNICE VIOLA et al., Plaintiffs and Appellants, v. DEPARTMENT OF MANAGED HEALTH CARE et al., Defendants and Respondents.	B174455 (Los Angeles County Super. Ct. No. BC306599)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Angelo & Di Monda, Christopher E. Angelo, Joseph Di Monda; Spellberg & Kornarens and Anthony Kornarens for Plaintiffs and Appellants.

G. Lewis Chartrand, Deputy Director, Amy L. Dobberteen, Assistant Deputy Director, and Troy R. Szabo, Staff Counsel for Defendants and Respondents.

The issue in this case is whether the plaintiffs may maintain an action for declaratory and injunctive relief against the California Department of Managed Health Care (Department) and its director because the Department, through the director, has approved health care service plans containing mandatory binding arbitration clauses. Plaintiffs argue this is in derogation of their right to civil jury trial. We conclude the action cannot be maintained because, under established law, an employer has the authority to negotiate such a contract on behalf of its employees.

FACTUAL AND PROCEDURAL SUMMARY

Plaintiffs Eunice Viola, Michael Viola, Michael Giammateo, Moira Giammateo, Muzeyyen Balaban-Zilke, Vicki Magee, and Viola Incorporated (plaintiffs) sued the Department, its past director (Daniel Zingale), and its present acting director (James Tucker) for declaratory and injunctive relief. The gist of the action is that the Department approved health care service plans containing mandatory binding arbitration clauses in violation of the plaintiffs' right to jury trial.

The complaint alleges that Michael Viola is president of Viola Incorporated, and that his wife, Eunice, is an insured under Viola's health benefit plan. In November 2001, the Viola company applied to Health Net Life Insurance Company for a small business plan group services agreement to provide health insurance coverage for its employees. Health Net responded with a plan that contained a mandatory, binding arbitration clause. Under that provision, disputes arising from the plan would be resolved by binding arbitration without the right to jury trial. This language was approved by defendants pursuant to the Knox-Keene Act. (Health & Saf. Code, § 1340, et seq., all statutory references are to this code unless otherwise indicated.) Health Net refused to negotiate an alternative to binding arbitration. On information and belief, the Violas allege that the practice of requiring mandatory binding arbitration "is followed by all health care plans doing business within the State of California pursuant to approvals granted by Defendants." Health Net refused to issue a policy for health coverage to the Violas because they would not accept the arbitration clause.

Plaintiff Michael Giammateo alleges that his employer offered him a Blue Cross of California health care plan containing a mandatory arbitration clause. He signed up for the plan, but crossed out all references to mandatory arbitration. His employer informed him that Blue Cross refused to provide a health care plan to the company because of these alterations. Fearing termination, and under duress, Giammateo agreed to the mandatory arbitration clause, stating in writing that his consent was obtained by duress. Plaintiff Moira Giammateo was an additional insured under her husband's policy.

Beginning in 1998, plaintiff Muzeyyen Balaban-Zilke, an employee of the County of Los Angeles, was offered a choice from six health care plans provided by her employer. Each contained a mandatory arbitration clause. She selected Cigna Healthplans of California as her health insurance provider, and learned during a dispute with CIGNA that the policy contained a mandatory arbitration clause.

In May 2002, plaintiff Vicki Magee, a police officer for the City of Los Angeles, was offered a health insurance plan from Blue Cross as part of her employment benefits. When she learned the policy contained a mandatory arbitration clause, Magee told her employer she did not want to waive her right to jury trial. The Los Angeles Police Relief Association told her that each policy offered to Los Angeles police officers contained an arbitration clause and that Magee's only choices were to agree to arbitration, or not participate in the employee health plans. Magee accepted the plan.

Plaintiffs allege that their state and federal constitutional rights to a civil jury, and their rights to due process were violated by state action when the defendants approved contract language in health care contracts of adhesion. They allege defendants were compelled to insist that health care plan contracts provide the insured a choice to decline mandatory arbitration. They allege that the defendants refused their request to compel health care insurers to remove mandatory arbitration clauses from their plans by refusing to disapprove these plans.

Plaintiffs "desire a judicial determination of their rights and a declaration as to the constitutionality of DEFENDANTS' action of approving health care plan contracts of adhesion in which PLAINTIFFS, and all other similarly situated persons, must surrender

their inalienable and fundamental right to a civil jury trial without choice, while under duress, for unconscionable consideration, and without being given any meaningful choice or option in which they may retain their inalienable and fundamental right to a civil jury and court access." Plaintiffs also sought injunctive relief prohibiting defendants from approving any healthcare plan that did not provide a choice of jury trial for dispute resolution.

Defendants' demurrer was sustained without leave to amend. The trial court found that binding arbitration agreements are constitutional where an agent for the employee has waived the right to jury trial, citing *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699. It found there is no constitutional right to medical insurance through a health care service plan, and that the plaintiffs were not compelled to sign the plans containing the waiver of jury trial.

The trial court also addressed the Department's argument that neither it nor its directors are proper parties to the action because any dispute is between the plaintiffs and health care insurers and must be resolved through other means. The trial court ruled: "Plaintiffs argue this is a pre-contract matter and therefore they are not bound to go through administrative channels, but, if this is the case, the discussion above shows they have no cause of action. As the [Department] correctly points out, if this is a pre-contract matter, then Plaintiffs were not forced to waive any right to jury trial. There is nothing in this complaint to adjudicate."

The trial court granted plaintiffs' motion to reconsider the ruling in light of three newly decided cases, and after additional briefing and a new hearing, again sustained the demurrer without leave to amend. An order of dismissal of the action was entered. Plaintiffs appeal from that order.

DISCUSSION

I

"'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives

the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 [9 Cal.Rptr.2d 92, 831 P.2d 317].)" (*Coast Plaza Doctors Hospital v. UHP Healthcare, supra,* 105 Cal.App.4th 693, 696-697.)

II

"The Knox-Keene [Health Care Service Plan] Act is '"a comprehensive system of licensing and regulation" (*Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1284 [270 Cal.Rptr. 907]), formerly under the jurisdiction of the Department of Corporations (DOC) and presently within the jurisdiction of the Department of Managed Health Care (DMHC) [citation]. "All aspects of the regulation of health plans are covered, including financial stability, organization, advertising and capability to provide health services." (*Van de Kamp,* at p. 1284.)' (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 155, fn. 3 [114 Cal.Rptr.2d 109] . . . .)" (*Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal.App.4th 693, 700; see also *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 793.)

III

Defendants contend that plaintiffs cannot show an actual controversy to support their action for declaratory relief. "'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.) "'An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute

whether a public entity has engaged in conduct or established policies in violation of applicable law.'" (*Ibid.*, quoting *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723.) Because plaintiffs challenge the Department's approval of health service plans under the Act, we conclude there is an actual controversy proper for resolution through an action for declaratory relief.

IV

"In California, health care service plans (or HMOs) are licensed and regulated by the Department of Managed Care under the Knox-Keene Act." (*Smith v. PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 Cal.App.4th 139, 150.) Plaintiffs' theory is that the Legislature's grant of powers to the Department to regulate health care service plans requires the Department to disapprove any plan which requires that disputes be resolved by binding arbitration. Their reasoning runs: (1) sections 1341.9 and 1352.1 of the Knox-Keene Act[1] grant the defendants all powers and duties relating to health care service plans, including the power to approve plan contracts; (2) under section 1352.1, plans with "untrue, misleading, deceptive" language or language that otherwise does not comply with the Act may not be approved; (3) the Department therefore may not approve a plan that contains an unconstitutional provision; (4) plaintiffs have a constitutional right to jury trial; (5) only they can waive that right; (6) health care service plans negotiated between an employer and an insurer containing a mandatory binding arbitration clause effect an unconstitutional waiver of right to jury trial; (7) therefore, the Department

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[1] Plaintiffs also invoke Insurance Code section 10291. But, "'[h]ealth care service plans under the Knox-Keene Act are generally subject to the jurisdiction of the Commissioner of Corporations (§ 1341) [now Director of the Department of Managed Health Care], *not* the Insurance Commissioner. Thus, Insurance Code section 740, subdivision (g), exempts health care service plans from Department of Insurance jurisdiction (though the Commissioner of Corporations is to consult with the Insurance Commissioner to ensure consistency of regulations to the extent practicable under section 1342.5). Regulations concerning health care service plans are found in title 10 of the California Code of Regulations, section 1300.43 et seq.' (*Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 729 [85 Cal.Rptr.2d 497], fn. omitted.)" (*Smith v. PacifiCare Behavioral Health of Cal., Inc.*, *supra*, 93 Cal.App.4th at p. 150, fn. 13.)

should be prohibited from approving any plan with a mandatory binding arbitration clause; and (8) the Department's approval of the plans the plaintiffs were offered was improper and the plaintiffs may challenge that approval.

Plaintiffs' argument is similar to that recognized in the landmark case of *Shelley v. Kraemer* (1948) 334 U.S. 1, which is not cited. In that case, the Supreme Court found that the action of state courts and judicial officers in enforcing private restrictive racial covenants constituted state action within the meaning of the Fourteenth Amendment to the United States Constitution. (*Id.* at pp. 18-19.) The court reiterated that "'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.'" (*Id.* at p. 15, quoting *Twining v. New Jersey* (1908) 211 U.S. 78, 90-91.) The court in *Shelley* concluded that "state action" "refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." (*Id.* at p. 20.)

Plaintiffs repeatedly assert that a "constitutional right to choose" between arbitration and jury trial lies at the heart of their complaint. We find no authority in the federal or state constitutions to support this claim. "[T]he strictures of due process apply only to the threatened deprivation of liberty and property interests deserving the protection of the federal and state Constitutions." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1059 (*Ryan*).) While plaintiffs invoke both the federal and state constitutional right to jury trial, the 7th Amendment to the United States Constitution does not apply to this state court issue. (*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 506.) Instead, we apply California Constitution, article I, section 16.

The fundamental problem with plaintiffs' case is that the California Supreme Court has recognized the waiver of the right to jury trial through agreement to binding arbitration by an employer who enters into a health care plan on behalf of its employees. (*Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d 699 (*Madden*).)

The *Madden* case is dispositive. In it, the Supreme Court concluded that an employer, acting as agent of its employees, has implied authority to agree to binding arbitration of malpractice claims arising under a health services plan it negotiates as part of an employee benefit package. (17 Cal.3d at pp. 706, 709.) In *Madden*, the Board of Administration of the State Employees Retirement System (Board) exercised its statutory authority to negotiate and enter into a health care plan with Kaiser to provide medical, hospital, and related services to state employees and their families. (Gov. Code, §§ 22774, 22790, and 22793.) The resulting contract required binding arbitration of any claim from the agreement. Plaintiff was mailed a brochure notifying her of this provision.

The Supreme Court first concluded that the Board, acting as agent, had the authority to bind state employees who enrolled in the Kaiser plan to arbitration rather than jury trial as the means of adjudicating disputes arising under the plan. It rejected plaintiff's argument that the arbitration clause was not enforceable because it was contained in a contract of adhesion and was not "'conspicuous, plain and clear.'" (*Madden, supra*, 17 Cal.3d at p. 710.) While the Supreme Court recognized that individual employees were presented with a "'take it or leave it'" choice to enroll in the Kaiser plan, it also found that the agreement was negotiated by Kaiser and the Board, parties of equal bargaining strength. (*Id.* at pp. 710-711.)

In *Madden*, the Supreme Court noted that the plaintiff could have selected from plans offered by the Board that did not contain such clauses. (17 Cal.3d at p. 711.) It also noted that plaintiff had the option of contracting individually for medical care. (*Ibid.*) The Supreme Court concluded that the principles barring enforcement of adhesion contracts "do not bar enforcement of terms of a negotiated contract which neither limit the liability of the stronger party nor bear oppressively upon the weaker." (*Id.* at p. 712.) Accordingly, the Supreme Court rejected the argument that adhesion principles prevented enforcement of the arbitration clause against Madden. (*Ibid.*)

The complaint before us provides no details of the health service plans at issue, other than the existence of mandatory binding arbitration clauses in each. The allegations

of unconscionability focus on the arbitration clauses. Under *Madden*, we are bound to conclude that adhesion contract principles are not a basis to conclude that the arbitration clauses are unenforceable.

Significantly, the Supreme Court in *Madden* also rejected an argument that the employer-negotiated health plan violated the employees' constitutional right to jury trial. The court cited California Constitution, article I, section 16: "Trial by jury is an inviolate right and shall be secured to all, . . . In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute." Code of Civil Procedure section 631, which specifies the means by which a party can waive civil jury trial, was held inapplicable to a predispute waiver of jury trial in an arbitration agreement. (*Madden, supra*, 17 Cal.3d at pp. 712-713.) The *Madden* court recognized that in agreeing to submit disputes to arbitration, the parties select an alternative forum in which there is no jury, and that thousands of commercial and labor contracts provide for arbitration without an express waiver of the right to jury trial. (*Id.* at pp. 714.) It expressed concern that these agreements had been regularly enforced by the courts, and that to rule that express waiver of jury trial was required by each employee would frustrate the intent of the parties to these many agreements. (*Ibid.*) The Supreme Court expressly declined to "fetter" the institution of arbitration "with artificial requirements that a contracting agent must secure express authorization to enter into an arbitration provision or that the provision itself must explicitly waive rights to jury trial." (*Id.* at pp. 714-715.)

While the Knox-Keene Act was enacted in 1975, a year before *Madden* was decided, it was amended to directly address arbitration under a health care service plan. In 1994, the Legislature added section 1363.1 to the Act,[2] which specifically provides:

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[2] In full, section 1363.1 provides: "Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions: [¶] (a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice. [¶] (b) The disclosure shall appear as a separate article in the agreement issued to the employer

"Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions: . . ." The statute goes on to specify that the disclosure: must clearly state that binding arbitration is required, and that it applies to medical malpractice claims; must be a separate article in the agreement issued to the employer or subscriber; must be "prominently displayed" on the enrollment form signed by the subscriber; clearly state whether the subscriber is waiving the right to jury trial for medical malpractice or other disputes, or both; shall be "substantially expressed" in language of Code of Civil Procedure section 1295; and that it be placed immediately before the signature line provided for the representative contracting with the health care service plan and for the individual enrolling in the plan.

"It is a fundamental rule of statutory construction that '[t]he Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.' (*People v. Harrison* (1989) 48 Cal.3d 321, 329 [256 Cal.Rptr. 401, 768 P.2d 1078].)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1096.) Applying this principle, we conclude that the Legislature was aware of *Madden* when section 1363.1 was enacted. Rather than abrogating that decision by requiring an individual waiver of right to jury trial by a person enrolling in a health care service plan requiring binding arbitration, the Legislature extended to enrollees the more limited protection of disclosure. We agree with the trial court that the enactment of

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group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee. [¶] (c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure. [¶] (d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan."

section 1363.1 evinces a legislative intent to allow binding arbitration in health care service plans negotiated by employers acting as agents of their employees.

Plaintiffs argue against this conclusion, apparently asserting that section 1363.1 means only that the health care service plan may include arbitration as an alternative forum to be selected by each individual enrollee. While the Legislature could have written the Knox-Keene Act in that fashion, it is significant that it did not. The plain language of the statute allows the Department to approve plans which require arbitration of disputes and plans that do not. There is no suggestion that the Department would not approve a plan that made arbitration elective, or did not provide for arbitration at all, if such a plan were presented.

Plaintiffs cite a line of authority in which courts have refused to compel arbitration in disputes arising from health care service plans where the arbitration clause did not comply with section 1363.1. (*Malek v. Blue Cross of Cal.* (2004) 121 Cal.App.4th 44; *Smith v. PacifiCare Behavioral Health of Cal., Inc.*, *supra*, 93 Cal.App.4th 139; *Imbler v. Pacificare of Cal., Inc.* (2002) 103 Cal.App.4th 567; *Pagarigan v. Superior Court* (2002) 102 Cal.App.4th 1121.) From this, they contend that the Department has failed in its duty to disapprove any health care service plan that does not comply with the Knox-Keene Act. But the complaint does not allege that the arbitration clauses at issue here failed to comply with the specific disclosure requirements of section 1363.1, and does not set out the language of the clauses. Whether or not the Department has ever approved plans that do not comply with section 1363.1 has no bearing on this case.

Plaintiffs argue the trial court misapplied the holding in *Madden* because the issue here -- the absence of a choice to choose binding arbitration -- was not discussed in *Madden*. But that claim does not withstand scrutiny. As we have seen, *Madden* decided that an employer is authorized to negotiate a health care plan that imposes binding arbitration on any employee who enrolls in it. The Supreme Court stated that under this circumstance, the employee has only the choice presented to the plaintiffs here: enroll in

the plan and give up a right to jury trial, or decline to enroll and forego health insurance coverage under the plan.[3]

Plaintiffs also attempt to distinguish *Madden*, arguing that, since there is no action pending against the insurers in the case before us, plaintiffs are not attempting to have arbitration clauses declared unconstitutional, and agents for the Viola plaintiffs unsuccessfully attempted to negotiate a contract without an arbitration clause. These arguments do not distinguish the essential holding of *Madden*. The significance of *Madden* to this case is that the defendants did not violate either the Knox-Keene Act or the right to jury trial by approving health care service contracts containing binding arbitration clauses.

As we have stated, there is no allegation that the Department is insisting that health care service plans include binding arbitration clauses. Instead, it is merely reviewing contracts negotiated privately between health care insurers and employers to ensure that they comply with the provisions of the Act. As *Madden* demonstrates, by agreeing to a binding arbitration provision, an employer has the authority to waive the right to jury trial of those of its employees who choose to join the health plan it negotiates. Plaintiffs claim they are unable to obtain alternative insurance that does not include a binding arbitration clause. Assuming that is so, it does not compel a different result in this case. The Legislature has authorized health care service plans that include binding arbitration provisions, so long as the plan complies with the disclosure requirements of section 1363.1.[4]

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[3] By letter brief, plaintiffs cite *Wisden v. Superior Court* (2004) 124 Cal.App.4th 750 for the proposition that the Legislature cannot constitutionally dispense with a right to jury trial. The case is inapposite because it dealt not with waiver of right to jury trial by binding arbitration, but with the availability of jury trial for a cause of action under the Uniform Fraudulent Transfer Act.

[4] We note that we are not dealing with a claim that the arbitration provision allegedly violates the procedural requisites announced by the court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. We assume that arbitration contracts, to be enforceable, must comply with this line of authority.

We conclude that plaintiffs failed to state a cause of action against defendants because they cannot show defendants violated either constitutional or statutory law by approving health care service plans which contain binding arbitration clauses.

DISPOSITION

The order of dismissal is affirmed.

CERTIFIED FOR PUBLICATION.

EPSTEIN, P. J.

We concur:

CURRY, J.

GRIMES, J.[*]

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.